(3)

Supreme Court, U.S.
FILED
DEC 5 2000
CLERK

No. 00-516

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.* MAX STEVENS,
Petitioners

v.

EAST ALABAMA HEALTHCARE AUTHORITY d/b/a
EAST ALABAMA MEDICAL CENTER, AND TERRY ANDRUS,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF THE PETITIONERS

ALVIN T. PRESTWOOD, *
VOLZ, PRESTWOOD, HANAN,
& BARGANIER, P.C.
Post Office Box 1910
Montgomery, AL 36102
(334) 264-6401

HUGH V. SMITH, JR.
Park Place Center, Suite 150
8650 Minnie Brown Road
Montgomery, AL 36117
(334) 215-8400

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

13 pp + f/o

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
The United States as The Real Party in Interest	1
The Failure to Submit a Plan of Correction as to Federal Medicare and Life Safety Code Deficiencies	1
The Application of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)	3
JCAHO Accreditation Issue	3
CONCLUSION	4

TABLE OF AUTHORITIES

CASES	Page
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)	3, 4

OTHER AUTHORITIES	
31 U.S.C. § 3730(b)(1)	1
42 C.F.R. 488.10(b)	3
42 C.F.R. 488.10(c)	3
42 C.F.R. 488.28(a)	2

ARGUMENT

The United States as the Real Party in Interest

At pages 4-6 of their response, the Respondents attempt to downplay the fact that the government is the real party in interest in the False Claim Act proceeding by asserting that it did not intervene in the proceedings. In its "statement of interest", however, the United States has asserted: "Although the relator has filed this action on his behalf and in the name of the United States, 31 U.S.C. § 3730(b)(1), the United States, as this Court has already ruled, is the real party in interest". (App. F, 16a). The petitioning relator therefore believes that he has an obligation, above and beyond matters of his own interest, to protect the interest of the United States.

The Failure to Submit a Plan of Correction as to Federal Medicare and Life Safety Code Deficiencies

While the Respondents clearly attempted in the courts below to confuse their submissions of the state licensure plan of correction with the required federal plan of correction for Medicare and Life Safety Code ("LSC") deficiencies, they no longer suggest that they filed the federal plan of correction, but have readily admitted "that EAMC . . . had *not* submitted a separate plan to HCFA". (Respondents brief, p.18) (Emphasis Added). Instead, they now contend, at page 9, footnote 6 of their brief, that "[t]here is no evidence in the record that EAMC was even provided with a copy of the Medicare and LSC deficiencies". That statement is wholly inaccurate. Defendants' Exhibit 3403, Bates Stamp page 000314, blocks 16 and 17, confirms on federal form HCFA-1539 that the facility of the Respondents was investigated on 5/17/96, 8/21/96, 10/23/96, and 11/22/96, that "a condition level deficiency" was found to exist, and clearly reflected the

following: "[*C*]*opy of statement of deficiency provided to facility*." (Emphasis added). (App. Q, 52a).[1]

At footnote 7 on page 9 of their brief, the Respondents refer to the affidavit of Robert Melton, an official of the State licensure and certification unit. Mr. Melton there states that " *I also sent a copy of the report and lists of Medicare Certification deficiencies to EAMC*." (App. R, 53a) (Emphasis added).

Also on page 9 of their brief, the Respondents plaintively contend that, while "L&C also cited EAMC for certain Medicare and Life Safety Code ("LSC") deficiencies", that "L&C neither required or requested EAMC to submit a separate plan of correction to HCFA on those deficiencies."

That contention begs the question at issue, because 42 C.F.R. § 488.28(a) permits a deficient facility to participate in the Medicare program "*only* if the facility has submitted an acceptable plan of correction for achieving compliance within a reasonable time acceptable to the Secretary." (App. I, 29a). Also, page one of HCFA form 2567 contains the beginning statement of Medicare deficiencies and contains a provision that states: "If deficiencies are cited, an approved plan of correction is requisite to continued program participation." (App. S, 56a).

The Respondents' brief, at page 9, is also significantly misleading when it states that "[t]he Affidavit of Robert Melton . . . does not state that a separate HCFA-2567 plan of correction was ever requested of EAMC by L&C." After the Melton affidavit confirmed that a copy of the Medicare deficiencies had indeed been sent to EAMC, containing the admonition that a plan of correction for those federal deficiencies was required for continued participation in the federal program, it concluded by asserting that "[t]he report

---

[1] The original Petition contained Appendices A through P, 1a-51a, and this brief will continue with Appendices Q through T, 52a-58a.

recommended that a plan of correction acceptable to HCFA be filed." (App. R, 53a).

With the clear knowledge that the HCFA form 2567 plan of correction was required for its continued participation in the program, EAMC should not be now heard to complain that no one specifically requested that it comply with that requirement. Whether such a "request" was ever made is wholly irrelevant to the issues here presented.

The Application of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)

The Respondents argue at pages 19-22 of their brief that this Court's rationale in *Hazel-Atlas* is inappropriate here. In the referring to *Hazel-Atlas*, the Petitioner was only asserting that his failure to detect the Respondents' misrepresentations at the trial was not dispositive of his claim. *Hazel-Atlas* clearly stands for and supports that contention, and the opinions of the lower courts have therefore "decided an important federal question in a way that conflicts with relevant decisions of this court."

JCAHO Accreditation Issue

At page 11 of their brief, the Respondents attempt to bolster their argument by asserting a 1997 accreditation by the Joint Commission for the Accreditation of Healthcare Organizations ("JCAHO"). In so doing, they assert that EAMC provided JCAHO with "all relevant information". Since all now concede that EAMC did not submit a federal plan of correction, it was literally impossible for such a plan to have ever been supplied to JCAHO in support of any accreditation application. Indeed, even if JACHO issued its accreditation with full knowledge of all the facts, Medicare certification would still have been unlawful, since EAMC was not "deemed to meet the conditions of participation" pursuant to a validation survey. 42 C.F.R. § 488.10(b) and (c). (App. T, 57a)

CONCLUSION

The Respondents have understandably pounded very hard, at pages 6 and 7 of their brief, upon the fact that the lower courts have imposed sanctions against the Petitioner and his counsel by characterizing this claim as frivolous. However, those findings were clearly based upon the conclusions that the Petitioner was not prevented from "making full and fair presentation of his case." If that conclusion was dispositive of the issues, this Petition would never have been filed.

The holdings below, however, are not conclusive, because the conduct of the Respondents in this case, coupled with the Petitioner's lack of diligence at the original trial, may have cost the government millions of dollars in federal funds and appears to have misled the judicial system into sanctioning that significant loss. The Petitioner is concerned that those factors will lead an objective reviewer to conclude that the Petitioner should have, in spite of threatened sanctions, asked this Court to review these issues in the light of the *Hazel-Atlas* rationale. For that reason, the Petitioner and his counsel now bring this matter before this Court.

Respectively submitted,

ALVIN T. PRESTWOOD, *
VOLZ, PRESTWOOD, HANAN,
& BARGANIER, P.C.
Post Office Box 1910
Montgomery, AL 36102
(334) 264-6401

HUGH V. SMITH, JR.
Park Place Center, Suite 150
8650 Minnie Brown Road
Montgomery, AL 36117
(334) 215-8400

* *Counsel of Record*